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SUPREME COURT, U.S.
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No. 03-1249

IN THE
SUPREME COURT OF THE UNITED STATES

PHYLLIS FILOSO,

Petitioner
Pro Se

V

PRINCE WILLIAM COUNTY SCHOOL BOARD
Respondent

PETITION FOR REHEARING

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Certificate of Grounds

This petition is filed in good faith that the grounds that are presented to this Court are of a controlling nature for individuals with "hidden" disabilities such as Filoso's. Additionally the substantial grounds were not previously presented to the Court.

The Court has also yet to rule on one of the cases cited in this brief, Pennsylvania State Police v Suders as to whether a "constructive discharge" is a form of adverse employment action.

Phyllis Filoso

Petitioner

Pro Se

QUESTIONS PRESENTED

I. Whether the Fourth Circuit has imposed upon Filoso a higher standard than that required for reasonable accommodation under the ADA as articulated by the U.S. Supreme Court in Barnett v U.S. Airlines?

II. Whether the Fourth Circuit can require that Filoso had to ask for a transfer directly in order to be accommodated under the ADA and Rehabiliation Act?

III. Whether the Fourth Circuit set a higher burden of proof for causal relationships in retaliation, that being that "protected activities" plus a formal complaint are necessary to establish a causal relationship.

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those listed in the caption of the case.

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PETITION FOR REHEARING

The following unaddressed conflicts of requiring individuals with hidden disabilities to provide direct evidence or demand higher burdens to survive summary judgment than other protected classes under Title VII affect an entire class of the disabled. A diability case should be judged considering all circumstances standards as in Harris v Forklift, or Burlington Industries, Inc. v Ellerth. Such inequities should not be allowed to stand.

I. The District Court and Fourth Circuit has imposed upon Filoso a higher burden than required for reasonable accommodation under the ADA as articulated by the U.S. Supreme Court.

The Appellate Court by affirming summary judgment imposed on Filoso a higher standard than the U.S. Supreme Court articulated in U.S. Airways v Barnett for a reasonable accommodation.

This U.S. Supreme Court in Barnett when discussing accommodations stated, "Many of the lower courts, while rejecting both U.S. Airways & Barnett more absolute views, have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way." "They have held that a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, i.e., ordinarily or in the run of cases." "The Act specifically says that "reassignment to a vacant position" is a type of "reasonable accommodation" ξ12111 (9) (B) emphasis added."

Reassignment to a vacant position to which an employee is qualified is a reasonable accommodation as recognized by the Supreme Court in giving limited deference to neutral employment actions. Barnett.

Filoso demonstrated to the Appellate Court that a vacancy existed to which she was qualified that would have met her accommodation requests. Bold for

emphasis. Petitioner's Brief page 18, Pet. Br.p.18. This vacancy was especially important as it was an earth science position which already had the accommodations Filoso requested. There was no "undue hardship" as claimed in post litigation. Such a transfer is necessitated by the ADA when an employer claims "undue hardship" to accommodate in current position. EEOC Enforcement Guidance Reasonable Accommodations.

The employer routinely has teachers transferring between buildings. The previous year Filoso was transferred, despite her objections. Had Filoso known she would receive no accommodations in her current position for the 2001 -2002 school year, Filoso would have directly asked for the transfer as her accommodation since it would not have violated any seniority system or arbitration agreement.

"**But for**" Filoso's employer's telling her she would be provided the requested accommodation in her current position and instead claimed "undue hardship" post litigation, Filoso would have directly asked specifically about positions for which she qualified. Filoso could have been reasonably accommodated as such a position was vacant and not missed any work due to no accommodation in the 2001-2002 school year.

The Fourth Circuit when refusing to deny summary judgment on the issue of the vacancy disregarded the clear instructions given to the Circuits by the U.S. Supreme Court in Barnett. Emphasis added

Filoso had already demonstrated through her effective evaluation signed off on May 1, 2001 that despite exposures to toxic substances in the building that were not in her immediate work environment, she did successfully perform all the essential functions of her job with the accommodation of a window in the 2000-2001 school year. Pet. Br.p.2.

An employer cannot avoid providing a reasonable accommodation by limiting an employee or prospective employee to only those employment opportunities where no accommodation is required. 42 U.S.C. ξ 12112 (b)(5)(A).

II. The District Court required that Filoso had to ask for a transfer directly.

The Court directly asked, "At the end of the 2000-2001 school year, is there any evidence in the record that your client requested a transfer to a different school? Counsel for plaintiff stated she did not specifically request a transfer, Your Honor, but there was no interactive process. Sum. Jud. P.20 The Court at that point ended discussion and ruled against Filoso stating, "she was unable to perform the essential functions of the job because she simply wasn't coming to work. Sum. Jud. P. 21.

The 7th Circuit stated in Haschman v Time Warner Entertainment Co., 151 F 3d 591, and 1998 that "plaintiff's poor job performance was not documented until she suffered a flare-up of her lupus." Accordingly, the court determined that there was sufficient evidence to support a jury finding that plaintiff had performed the essential functions of her position and was terminated in violation of the ADA.

In Filoso's case there was no "unprofessional conduct" of excessive absences as claimed by her employer until (with knowledge of her disability) continued to demand she work in environments where known toxic and hazardous substances were in the environment. This exacerbated her disability. Filoso points to a completely satisfactory evaluation completed just prior to such exposures in May 2001. Pet . Br. p.2.

The District Court had earlier asked a relevant question, "what about how many other high schools are in the system, and would there have been any other to your knowledge, any other high schools in Prince William County where the labs had outdoor windows? Counsel McGowan for the employer answered "I can't answer that question. There are 7 other high schools. Counsel then discusses the year prior to the relevant time period. Summary Judgment Transcript, Sum Jud. P.15.

It is undisputed that Filoso's employer never discussed vacancies, alternatives, or option with Filoso or her teacher's association. Pet.Br.p.7.

By expecting Filoso to directly ask for a specific transfer to a building when she has no knowledgeable of vacancies, the workings of HVAC systems in various schools, had limited knowledge of schools that had windows and would not have personal knowledge of schools with air quality issues such as Forest Park and the chronic sewer gas is completely unreasonable. The interactive process as it was intended by Congress and the ADA was crucial to meet accommodation requests and as a result of not abiding by this protocol, it was inconceivable for the courts to expect Filoso to have this knowledge.

Filoso directly asked to be accommodated and to remain an employee of PWCS on several occasions. Pet. Br.p.6.

The courts have long recognized that personnel directors such as Fitzgerald would have knowledge of vacancies that Filoso was qualified for and would have access to information concerning HVAC systems and schools with science rooms that had windows that function that Filoso was not privy to. This information would then have allowed the interactive process to proceed.

No such a discussion occurred and instead with full knowledge of all of Filoso's accommodation requests gave Filoso and her doctor <u>false</u> and misleading information that she would be accommodated in her current position and then didn't. Pet.Br.p.9,10.

The <u>Barnett</u> Court also recognized that a reasonable accommodation by its very nature usually involves a change in the "status quo" by giving limited deference to neutral employment policies. Keeping Filoso in the exact same building, under the same environmental conditions, and making the situation "more difficult" by taking away the room she had the year before with a window doesn't even allow for even "status quo" but subjecting her to more injury. Pet. Br.p.8.

As testified at the "Fact Finding Hearing" PWCS has no written policy for ADA requests and accommodation follow-up, or discussions. There are at best some scribbled notes on a couple of occasions, or not all. There is no policy for a plan of accommodation that employee and employer discuss and agree upon. Filoso's employer has sat in the "driver's seat" on every single decision involving her disability and not allowed her to participate in the decisions involving her accommodations which have resulted in injury to Filoso.

Even though the employer has both an ADA and 504 compliance officer it is a hodge podge of over 80 building principals interpreting the "ACTS"and making the decision whether to accommodate. Pet. Br. App.C p.19. In violation of the 504 Rehabilitation Act the final decision is left to the building principal according to Fitzgerald even though the Rehabilitation Act specifically states it is his job as compliance officer to ensure the Act is carried out. Fitzgerald stated that he had no authority to tell a principal what to do. Pet.Br. App.C.p.19.

By failing to transfer Filoso she was denied the benefits and privileges of employment.

III. Review by the U.S. Supreme Court is necessary as the Fourth Circuit sets a higher burden of proof for causal relationship in retaliation, that being that a formal complaint has to be made.

The **Third** Circuit in Shellenberger v Summit Bancorp, Inc. May 2002 when it quoting Soileau V. Guilford of Maine, Inc., 105 F 3d. 12, 16 (1st Cir. 1997), "it would seem anomalous... to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they file a formal charge. This would leave employees unprotected if an employer granted the accommodation and shortly thereafter terminated the employee in retaliation." [1]

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[1] See also Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 786 (3rd Cir. 1998), ("we see no basis for holding that a person who is adjudged not to have a disability may not assert a retaliation claim based on some

At Summary Judgment the Court stated that, "In particular, the plaintiff was on notice from April 26, 2001 which is several months before she filed her formal complaint about a potential ADA violation, that her absenteeism was unacceptable and had to be corrected, and then on September 18, 2001, several months later, there's a second letter, and that predates again her complaint. It references the April 26 letter, and then in that letter, she is told her absenteeism is unacceptable." Sum.Jud.p.23.

In April 2001 Filoso engaged in the "protected activities" of notifying employer of hazardous/unsafe conditions, asking for corrective actions, asking for accommodations, notifying them of illness from such exposures, filing an Accident Report and when conditions continued notified Virginia OSHA of such conditions. All of these predated Filoso receiving the letter from Fitzgerald dated April 26th. Pet. Br.p.4-5.

Once Filoso spoke to Fitzgerald in early May with Prince William Education Association (PWEA) representative, Caudill present Fitzgerald did not oppose Filoso's leave of absence as it related to the sewer gas and he told her to bring in what is now a third letter in two months from her doctor documenting her disability and accommodations needed. Filoso had brought in the first letter in response to the conversation with her principal in March for accommodations for the next year. She had brought the second letter due to leave necessary because of the sewer gas and now Fitzgerald wanted a third letter, which Filoso complied with. Pet. Br. p.3,5,6. Had not Fitzgerald granted the leave or shown an interest to discuss accommodations for

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form of protected activity other than the filing of a formal complaint."); and Selenke v Med. Imaging of Colo., 248 F.3d 1249, 1264 (10th Cir. 2001) ("to prosecute an ADA retaliation claim for requesting reasonable accommodations, a plaintiff need not show that she suffers from an actual disability..... A reasonable good faith belief that the statue has been violated suffices.").

the following year, then a grievance and possible formal charge with the EEOC would have been necessary.

Filoso was acting in "good faith" to try and find reasonable accommodations for her disability that would allow her to do all the essential functions of her job.

Had Filoso violated an attendance policy than the April 26th letter should have stated she violated the attendance policy. Instead the letter goes into a lengthy discussion of alleged teaching performance deficiencies. The alleged deficiencies are an attempt to cast doubt on Filoso's job performance and to falsify a document that as Personnel director, Fitzgerald knew could be used in any possible termination proceedings against Filoso. Such letter was used in such proceedings. Filoso's principal signed off on a completely effective evaluation of a year long evaluation of all of Filoso's essential job functions dated May 1, 2001, four days after the April 26th letter was written showing direct contractions to those statements. Pet. Br. p.2.

Fitzgerald's statements in the April 26th letter concerning Filoso's job performance are completely refuted in Filoso's , evaluation, deposition, Fact Finding testimony. Principal Gill's deposition stated he saw Filoso moving lab equipment in the hallway. Although Filoso disputes the time of day he verified Filoso was doing labs with her students. Such evidence is also validated in her student's performance on the Virginia state mandated SOL tests. Pet.Br.App.C p23-24.

Such an attempt to document nonexistent problems prior to Filoso asking for accommodation due to the sewer gas indicate that the employer is trying to build a deliberately false case to get rid of Filoso. The employer is tired of having to deal with her accommodation requests because of failure on their part to deal with persistent indoor air quality issues in their buildings. Filoso's request to stop toxic sewer gas from coming into her room was completely reasonable as pointed out to the Court. Sum.Jud.p.4. If the employer cannot do Filoso's suggestion then they have an entire maintenance department and environmental shop to consult

with to find an alternative. The employer never consulted and responded no to Filoso's request which then allowed sewer gas to continue to enter her room.

The employer's attempt to build a deliberately false case is also evident in calling Filoso's accommodation request incredulous and she is told not to make any more requests. Pet. Br.p.5.

The employer provided no alternative nor do they provide her with an alternative accommodation until the sewer gas problem can be resolved. Filoso's only option is leave of absence and she received the April 26th letter of reprimand for requested leave Despite Filoso inquiring about the sewer gas so that she could return to work her employer never contacted her, PWEA, or her doctor concerning the status of the building.

Upon preparing to return to school in late Aug. 2001 after her leave of absence and summer vacation Filoso found out that the accommodations her employer had stated they would provide were not done. Not only were they not done but Filoso's job was made even more difficult by moving her out of the room with a window and into a room without one. Through discovery in violation of school board policy, immediately following her return from leave every word and comment is being documented in a daily log, and maintained in her personnel file something no other employee has done on them. Pet.Br.App.C.p.36.

Filoso protested the lack of accommodation to PWEA, both she and Caudill attempted to secure her accommodations from both Fitzgerald and Gill. Principal Gill intentionally told her that all floor waxing had been completed a couple of weeks prior when she complained in his office on Aug. 27th 2001. However, employers own documents in discovery indicated it was still continuing during Filoso's first week in the building. Respondents Brief page (Resp.Br. p.).

Filoso also protested to her assistant principal, Carolyn Custard about accommodations not being met. Pet.Br.p.23.

Gill was knowledgeable that she was meeting with an attorney and told directly there would be one more attempt to secure her accommodations. Pet.Br.p.9. Filoso then receives the Sept. 18, 2001 letter.

The Sept. 18th letter states that Filoso has been accommodated to the satisfaction of her doctor. Pet.Br.p.22. This was a completely false statement made to conceal employer's knowledge that according to her doctor's letter dated Sept. 13th directly contradicted that statement and that employer had knowledge of the doctor's letter, when the Sept. 18 letter was written. Pet. Br.p.22. Such attempt to conceal her doctor's documentation and coerce Filoso into remaining in an environment that her employer knew was making her physically ill daily, in and of itself imparts vicarious liability. Filoso immediately filed a grievance for such a letter and failure to accommodate. It is not until Oct. 31st 2001 for the first time the employer after having initiated termination proceedings against her claims Filoso has no disability. Pet. Br. p.27.

Beginning in Aug. of 2001 and until Filoso is terminated there are numerous e-mails between Principal Gill and the Personnel department to include the director that ridicule and mock her disability and her accommodation requests. Pet. Br.p.25, Pet Br. App.C.36-38.

Fitzgerald at the last meeting with Filoso in early July compared her to "bubble boy". "Bubble boy" refers to a child with an autoimmune disorder that dies. A second e-mail states "another nail in her coffin". Yet another states, "ready to pull the plug on her", which refers to pulling the plug on someone's life support. Pet. Br.p.25, App.C 36-38. Each one of these comments discusses morbidity in reference to discussion of either Filoso's disability or her request for accommodation.

The 9th Circuit has further stated in Ellison v Brady, 924 F.2d 872, 875-76 (1991) ruled that "whether the workplace is hostile is determined from the perspective of a reasonable person with the **same fundamental characterists(** bold for

emphasis). 924 F2d at 879. In Nichols v Frank, 42 F 3rd 503 9th Cir. Nov 29, 1994) (objective standard considers standpoint of reasonable person with accuser's defining traits including race, sex, age, **disability,**(emphasis added) and sexual orientation. Hostility must be based on the totality of the circumstances".

Filoso respectfully asks this court "pray tell", how much more of a causal connection and hostile environment does the court need for Filoso's disability and the adverse employment actions taken to include termination?

It is evident that Filoso's employer is attempting to force her out when they deliberately made her job 'more difficult' by moving her to a room with no window. If the employer's terms and conditions of employment require her to be in a science room, then the employer should have transferred her to the vacant position with a window.

The Supreme Court in Pennsylvania State Police v Suders 2004 has yet to rule whether a constructive discharge is an adverse employment action.

Filoso's employer was simply tired of Filoso's request for what they considered "baseless" requests for accommodations as Gill stated after termination proceedings. He stated "she didn't have a disability and that he didn't do any of her requested accommodations for the 2001-2 school year". Pet. Br. p. 27.

Filoso was fired out of retaliation for requesting accommodation "in good faith" for her disability and due to her employer's failure to provide her a transfer or a "safe work environment", as required by the ADA and her contract so that she could fulfill all the essential functions of her job to include attendance.

CONCLUSION

Filoso respectfully asks this Court to reconsider all the circumstances as other protected classes under Title VII cases receive and grant Certiorari to hear her case.